IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-851

ALFRED FAYER,

Petitioner,

v.

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE,
TENTH JUDICIAL DISTRICT,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE APPELLATE DIVISION OF THE NEW YORK SUPREME COURT

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PRELIMINARY STATEMENT

This brief is submitted in opposition to the petition for a writ of certiorari to review the judgment of the Appellate Division of the New York State Supreme Court.

The petitioner was automatically disbarred by order of the Appellate Division of the New York State Supreme Court, Second Department, pursuant to Section 90(4) of the Judiciary Law and the inter-

pretation thereof in Matter of Chu, 42 N.Y.2d 490 (1977).

REASON FOR DENYING THE WRIT

THE STATE OF NEW YORK HAS NOT VIOLATED PETITIONER'S RIGHT TO DUE PROCESS GUARANTEED BY THE FOURTEENTH AMENDMENT BY AUTOMATICALLY DISBARRING HIM WITHOUT A PRIOR HEARING

The words "punishment" and "penalty" are used to describe sentencing after a criminal conviction. A disciplinary proceeding, although characterized as "quasi-criminal" in nature, cannot be equated to a criminal proceeding (Matter of Kelly, 23 N.Y.2d 368), which interprets In re. Ruffalo, 390 U.S. 544.

The State, which has the authority to extend the privilege to a person to practice law within its jurisdiction, also has the authority to diminish or remove that privilege.

In a fairly recent case (April 5, 1977), the New York Court of Appeals reaffirmed the words of Judge Cardozo:

> "We hold that disciplinary sanctions are not punishment within the meaning of Section 50.10. As Judge Cardozo explained in Matter of Rouss (221 N.Y. 81, pp 84-85): 'Membership in the bar is a privilege burdened with conditions. A fair, private and professional character is one of them.. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards [citations omitted]. Whenever the condition is broken, the privilege is lost. To refuse admission to an unworthy applicant is not to punish him for past offenses. The examination into character, like the examination into learning, is merely a test of fitness. To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime.' Whether the practice of law is termed a privilege (Matter of Rouss, supra) or a right (Matter of Levy, 37 N.Y.2d 279, 282), disciplinary sanctions imposed for misconduct are not criminal penalties under the statute." (Matter of Anonymous, 41 N.Y.2d 506, 508.)

The concern of New York State in permitting a convicted attorney to continue practicing law is best expressed in Matter of Mitchell (40 N.Y.2d 153), which quotes Judges Cardozo and Bradley:

> "In our view, this concern for the protection of the public interest far outweighs any interest the convicted attorney has in continuing to earn a livelihood in his chosen profession. Appellant, upon admission to the Bar, becomes an officer of the court, and, 'like the court itself, an instrument or agency to advance the ends of justice.' (People ex rel. Karlin v. Culkin, 248 N.Y. 465, 471 [CARDOZO, J.]). To permit a convicted felon to continue to appear in our courts and to continue to give advice and counsel would not 'advance the ends of justice', but instead would invite scorn and disrespect for our rule of law. Justice BRADLEY, writing nearly one hundred years ago, expressed this same fear in language equally applicable to this case and particularly to this attorney: 'Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world,

> to repudiate and override the laws, to trample them under foot, and to ignore the very bands of society, argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve.' (Matter of Wall, 107 U.S. 265, 274.)" (supra at 156).

Likewise, the Federal Courts have reaffirmed this position in Matter of Echeles (430 F.2d 347):

> "Preliminarily, it would be well to note that disbarment and suspension proceedings are neither civil nor criminal in nature but are special proceedings, sui generis and result from the inherent power of courts over their officers. Such proceedings are not lawsuits between parties litigant but rather are in the nature of an inquest or inquiry as to the conduct of the respondent. They are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public

> from the official ministration of persons unfit to practice." (Id. at 349; see: Matter of Ming, 469 F.2d 1352).

For these reasons, the New York Court of Appeals, on October 13, 1977, modified its holding in Matter of Donegan, 283 N.Y. 285 by its ruling in Matter of Chu, 42 N.Y.2d 490, when it held:

> "We conclude that conviction of an attorney for criminal conduct judged by the Congress to be of such seriousness and so offensive to the community as to merit punishment as a felony is sufficient ground to invoke automatic disbarment. Whatever may have been the proper evaluation of a felony conviction in courts other than those of our own State in 1940 when Donegan was decided, we now perceive little or no reason for distinguishing between conviction of a federal felony and conviction of a New York State felony as a predicate for professional discipline." (supra at 493).

With regard to the petitioner's argument that he has not been afforded due process because he has not been granted a

plenary hearing, the New York Court of Appeals has stated that the "constitutional guarantee of due process is safeguarded by his [the petitioner's] jury trial and appellate review" (Matter of Abrams, 38 A.D.2d 334, at 336).

As to the "seriousness of the felony", New York State seems to be saying that if the crime is serious enough for the United States Congress "to merit punishment as a felony", then it "is sufficient ground to invoke automatic disbarment." (Matter of Chu, supra). Although Matter of Thies, ___ N.Y.2d ___ (October 1978) (No. 389) may have been described as a "kindergarden shouting and pushing match", it was, in fact, a case in which an attorney was convicted of a felony for assaulting a federal officer.

If the New York Courts have the authority to discipline its attorneys and a felony conviction is considered sufficient grounds to disbar, then there is no need for a plenary hearing to draw "meaningful distinctions."

The petitioner, who was convicted on four counts of making false declarations, should not be heard to complain, as these acts are certainly within the meaning of professional misconduct, albeit classified as "illegal conduct involving moral turpitude" or "conduct involving dishonesty, fraud, deceit or misrepresentation." (The Lawyer's Code of Professional Responsibility, American Bar Association, adopted by the New York State Bar Association on January 1, 1970, DR 1-102(A)(3) and (4)). He has also been afforded the opportunity to present oral argument on the merits,

in defense of the charges and all mitigating circumstances during his criminal trial in the Federal Court. His constitutional guarantee of due process was safeguarded in that proceeding (Matter of Abrams, supra).

In a recent case where the petitioner argued that the Ohio permanent disbarment rule was punitive and that a presumption of unfitness without an opportunity to prove otherwise denied procedural and substantive due process, this Court denied certiorari (Shott v. Startzman, ___ U.S. ___, No. 77-327).

Also, this Court has denied certiorari in several recent New York cases where violations of due process were argued (Peltz v. JBAGC, 98 S Ct. (1978), No. 77-1437; Davis v. JBAGC, 99 S Ct. (1978), No. 77-1790; Rosenberg v. JBAGC (October 30, 1978).

Regarding the "suggested guidelines" of the American Bar Association, it should be stated that these rules have not been adopted by the New York State Bar Association.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Mineola, New York
December 8, 1978

Respectfully submitted,

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